United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7425

United States Court of Appeals

FOR THE SECOND CIRCUIT

B
P/S

AEROTRADE, INC. AND AEROTRADE INTERNATIONAL, INC.,

Plaintiffs,

—against—

REPUBLIC OF HAITI,

Defendant-Appellee,

—against—

HARTFORD ACCIDENT INDEMNITY COMPANY,

Respondent-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE

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BRIEF FOR DEFENDANT-APPELLEE

Issues Presented

1. Whether the successful defendant in a quasi in rem action is entitled to recover interest charges incurred by its bank and later charged to the defendant's account.

2. Whether the defendant in a quasi in rem action is [illegible]ated to reduce the exposure on the attachment bond by [illegible]ng a release-of-attachment bond of its own.

Statement of the Case

This case involves a motion under Federal Rule 65.1 to enforce a bond issued by respondent insurance company. The bond was given as a condition for an order of attachment secured ex parte by plaintiffs at the commencement of a quasi in rem action against the Republic of Haiti, Appellee herein. The principal action was dismissed by Judge Edward Weinfeld in May of 1974 on grounds of sovereign immunity. *Aerotrade, Inc.* v. *Republic of Haiti,* 376 F. Supp. 1281 (S.D.N.Y. 1974). After six months of informal conversations and correspondence with the insurance company that had issued the bond, this motion was brought in December, 1974 to collect on the bond. Following a reference to and recommendation from Magistrate Schreiber, Judge Weinfeld decided the motion in defendant's favor in July, 1976. *Aerotrade, Inc.* v. *Republic of Haiti,* 416 F. Supp. 1114 (S.D.N.Y. 1976). The judgment on the motion under Rule 65.1 awarded the full amount of the bond ($35,000) plus interest from June 1974. Judge Weinfeld decided that the event against which the bond was given occurred, that the damages suffered as the result of the attachment exceeded the amount of the bond, and that the issuer of the bond must accordingly pay the full amount of the bond. This appeal seeks to overturn that judgment.

Statement of Facts and Proceedings Below

The Principal Action

In January, 1972, a Florida arms dealer, Aerotrade, Inc., made a contract with the Republic of Haiti for the supply of a variety of weapons for Haiti's armed forces. In

an inquiry into the relationship between the arms dealer and the Minister of Defense who had negotiated the contract on behalf of the Republic, the government served notice that the contract was being terminated. Following several months of frantic negotiations in and with Haiti by the President of Aerotrade, Aerotrade attempted to bring an action against the Republic of Haiti in New York.[1] Since Haiti was not present or doing business in New York, and since in any event service of process against a government was a violation of United States Law (22 U.S.C. §§ 252-253 (1970)), Aerotrade attempted to bring a quasi in rem action in New York by attaching funds of the Republic of Haiti on deposit with New York banks. Aerotrade secured an Order of Attachment, ex parte, from Judge Weinfeld on August 21, 1973 for $867,000 (App. 13a), conditioned on the furnishing of a bond in the amount of $40,000. The bond (App. 15a) was furnished on August 23, 1973 by the Hartford Accident and Indemnity Company, Respondent-Appellant herein. $5,000 of the bond was to secure the allowable fees and expenses of the marshal; no claim was submitted by the marshal. The other $35,000 of the bond, which is the subject of the present motion and appeal, were an undertaking by Hartford to

> "pay to the Defendant, REPUBLIC OF HAITI, all legal costs and damages which may be sustained by reason of the attachment if the defendant, REPUBLIC OF HAITI, recovers judgment or it is finally decided that the plaintiffs . . . were not entitled to an attachment of the Defendant's, REPUBLIC OF HAITI, property. . . ."

On instructions of plaintiffs' counsel, the Order of Attachment of August 21, 1973 was served by the U.S. Marshal on First National City Bank of New York, but was returned

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[1] The complaint appears in the Appendix at p. 9a.

unsatisfied, upon certification by the relevant official of First National City Bank that it maintained no account in the name of the Republic of Haiti. (See Kraus Affidavit, App. 29a). Thereafter plaintiffs secured a second Order of Attachment, also ex parte, dated October 5, 1973. The second Order of Attachment also directed the marshal to levy on property of the defendant, and also was to be executed by levying on funds on deposit at First National City Bank. This time, however, the Order of Attachment directed the marshal to levy on "any and all bank accounts and other property which exist in the name of Banque Nationale de la République d'Haiti." This Order was signed by Judge Weinfeld on the strength of an Affidavit of James O. Byers, President of plaintiff companies, (App. 34a) to the effect that funds on deposit at First National City Bank in the name of Banque Nationale were really funds of the Republic of Haiti. No new bond was required. The Order of Attachment of October 5, also signed by Judge Weinfeld, stated that the bond issued on August 23 shall be "deemed good and sufficient undertaking for this Order of Attachment." (App. 39a).

The second Order of Attachment was carried out.[2] There were funds of Banque Nationale on deposit with First National City Bank; these funds were levied upon on October 5, 1973 and turned over to the marshal on November 2, 1973 (App. 20a) in the full amount of $867,000.

On November 5, 1973, a motion was made on behalf of the Republic of Haiti to dismiss the complaint and vacate the attachment, and for the next several months a variety of affidavits and exhibits were submitted to Judge Weinfeld in support of or opposition to this motion. Haiti raised three defenses to the complaint and attachment:

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[2] Actually it was the third order issued in this case; the second one, dated September 20, 1973 (App. 25a), was withdrawn when plaintiffs realized it had been based on a false affidavit.

1. that Haiti was immune from suit and that the claim sought to be brought against it—arising out of a procurement for the armed forces—fit expressly into one of the categories excluded by the Second Circuit from application of the so-called restrictive theory of sovereign immunity.[3]

2. That the action could not be brought in the Southern District of New York because no federal question was involved and because the claim by a foreign corporation (Aerotrade) against another foreign entity (the Republic of Haiti), having no connection with the state of New York, was barred by New York Business Corporation Law 1314.

3. That the attached funds belonged to Banque Nationale and not to the Republic of Haiti, and hence that attachment of these funds could not give the court jurisdiction (even quasi in rem) in a claim against the Republic of Haiti.[4]

In connection with the third defense, Judge Weinfeld requested and received detailed submissions from the parties. The thrust of the evidence submitted on behalf of the Republic of Haiti was that under Haitian law and in fact Banque Nationale de la République d'Haiti was a separate and distinct entity, affiliated in various ways but not interchangeable with the Republic of Haiti. Plaintiffs vigorously controverted this conclusion, which was, of course, contrary to the assertions made when they were

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[3] See *Victory Transport, Inc.* v. *Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354, 360 (2d Cir. 1964), cert. den. 381 U.S. 934 (1965).

[4] All of these defenses, as well as a number of issues of procedure that arose in the principal case, are discussed in an article about the case by present counsel, Lowenfeld, "Litigating a Sovereign Immunity Claim,"—the *Haiti* Case, 49 N.Y.U. L. Rev. 377 (1974).

applying for the second Order of Attachment. The issue was not decided by the court, because the motion to dismiss was granted on grounds of sovereign immunity.[5] When the motion to collect on the bond was brought on, however, plaintiffs, and in their wake the insurance company, used the affidavits submitted on behalf of Haiti as the basis of their resistance to enforcement of the bond.

The Motion to Collect on the Bond

In brief, plaintiffs (who participated in the motion on the bond until the appeal stage) and the insurance company conceded that interest expenses on attached funds are payable out of the bond. They argued, however, that the interest expenses in this case were borne by Banque Nationale, which was not a party, while the bond ran to the Republic of Haiti, which was.[6] Most of the proceedings on the motion—before Magistrate Schreiber and before Judge Weinfeld—turned around the question of whether the interest expenses attributable to the attachment had actually been borne by the defendant. When it became clear in the course of the evidence presented before the Magistrate that Haiti had actually borne the expenses, the argument shifted. The final contention of the insurance company, accepted by the Magistrate, rejected by Judge Weinfeld, and raised again on this appeal, was that though Haiti ultimately paid the charges attributable to the at-

[5] At least by implication, however, Judge Weinfeld rejected the "alter ego" characterization, in deciding the companion action against Banque Nationale described in note 6 *infra*.

[6] Plaintiffs sought to bring a separate action against Banque Nationale, but Judge Weinfeld rejected the attempt on the ground that there was no evidence that Banque Nationale had been a party to the contract on which the action was based. *Aerotrade, Inc.* v. *Banque Nationale de la Republique d'Haiti*, 376 F.Supp. 1286 (S.D.N.Y. 1974).

tachment, it did not have to do so and therefore the insurance company could avoid reimbursement under the bond.

Evidence and Findings

When the motion on the bond came before him on February 4, 1975, Judge Weinfeld referred the matter to Magistrate Schreiber "for hearing and testimony to determine damages." (App. 62a). Haiti submitted two elements of legal costs and damages recoverable against the bond: counsel fees in connection with the motion to vacate the attachment, and interest charges incurred by virtue of the attachment. Leaving aside the question of counsel fees,[7] the testimony on the interest charges can be divided into two parts:

(a) The Interest Charges

The testimony showed clearly that Banque Nationale maintained an active commercial account at First National City Bank used to finance Haiti's foreign commerce, including trade acceptances, letters of credit, and the like; that as the result of the attachment, funds on hand were

[7] There was a small controversy on counsel fees. The Magistrate recommended that 32 hours of the legal fees charged by counsel and paid by Haiti was not reimbursable under the bond because it represented work on the companion case against Banque Nationale cited in footnote 6. (App. 264a). Haiti took the position that all of the work performed by counsel related directly to the attachment; moreover, as Judge Weinfeld said during oral argument on the exceptions to the Magistrate's recommendation, there is no requirement of a precise hourly breakdown of counsel fees, and the total amount of the bill, $15,600 plus $619.80 disbursements, was surely reasonable considering the total amount involved, the complexity of the case, and the qualifications of counsel. The issue was not finally determined by Judge Weinfeld, and need not be determined here if the decision below is upheld, since the interest charges and uncontested counsel fees are well in excess of the amount of the bond.

often insufficient to carry on the continuing activities for which the account had been established; that overdraft facilities were available to Banque Nationale on said account; and that continuing use was made of these facilities at interest rates related to the New York prime rate. The Assistant Cashier of First National City Bank in charge of the account submitted an affidavit with bank records (App. 73a-88a), and also testified (App. 127a-159a) to the effect that a separate computation had been made of overdraft charges directly attributable to the attachment; that the total of such charges was $46,810.38, and that these charges had been deducted by First National City Bank from Banque Nationale's account on a daily basis.

(b) Reimbursement by Haiti

The testimony showed that the understanding between Banque Nationale and the Republic of Haiti throughout the litigation was that the Republic would reimburse Banque Nationale for the latter's out-of-pocket expenses (App. 164a). At first Banque Nationale made no attempt to collect the sum, expecting that the whole matter would be settled at the time the bond was paid. When it became evident that payment on the bond would be delayed, the President of Banque Nationale wrote to the Secretary of State for Finance and Economic Affairs that Banque Nationale was debiting the account of the Republic for the amount of Banque Nationale's out-of-pocket expenses in connection with the attachment (App. 101a, tr. 103a), and the Secretary of State for Finance and Economic Affairs gave his assent thereto (App. 99a, tr. 100a). The reimbursement was thereupon carried out by a debit to the account of the Republic of Haiti—$234,051.90 Gourdes—equivalent to U.S. $46,810.38 (App. 102a, tr. 104a). Magistrate Schreiber found as fact that the exchange of letters had taken place and that the reimbursement had been

carried out (App. 262a). This finding is clearly correct and was accepted by Judge Weinfeld. It is not challenged in this appeal. In addition, the Magistrate reached a legal conclusion, which he included in his recommendation to Judge Weinfeld. The Magistrate thought (i) there had been no consideration for reimbursement by Haiti to Banque Nationale; (ii) the obligation by Haiti to reimburse Banque National was only a moral obligation and not a "legal obligation enforceable by this court"; and (iii) "the court [sic] therefore concludes that the interest charges sustained by Banque as a result of the attachment are not recoverable under the bond by Haiti" (App. 263a).

Judge Weinfeld accepted the Magistrate's determination of facts, but rejected each of these proposed conclusions of law. He held:

> The record establishes that not only did Haiti agree to reimburse Banque for the interest charges, but also that, under the law of Haiti, Banque could have sued to recover such interest charges. The fact that Haiti's agreement to reimburse Banque was not in writing at the date of the attachment is immaterial; there is no requirement that such obligation be written. So, too, it is immaterial that Banque may have a separate and independent claim against plaintiffs based upon an improper attachment of its funds.
>
> Since the interest charges paid by Haiti to Banque were a direct consequence of the withdrawal from and the depletion of its account by reason of the attachment against Haiti, Haiti is entitled to recover the sums so paid as damages under the terms of the undertaking in its favor.
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> 416 F. Supp. at 1115, App. 269a.

Summary of Argument

I Judge Weinfeld properly accepted the determinations of facts made by the Magistrate; equally properly Judge Weinfeld reached his own conclusions of law without being bound by the Magistrate's recommendations. The issue of deference to the factual findings of the master under Federal Rule 53 is not involved in this case.

II The operative fact that gives rise to the present dispute is that plaintiffs in the original case secured an attachment of Banque Nationale's funds on the strength of an assertion—in the ex parte phase of the litigation—that these funds belonged to the defendant. The court below properly decided that the insurance company cannot be allowed to benefit from its customers' (plaintiffs') misstatement concerning ownership of the funds to be attached. The insurance company gave an undertaking that it would pay if a certain event occurred, i.e., if the attachment were vacated or the action dismissed. That event did occur, and the insurance company must make good on its undertaking.

III Under the applicable law of New York, both counsel fees and interest charges are recoverable by the successful defendant of an action begun by attachment.

IV There is no merit to any of the other defenses raised by the insurance company on this appeal. There is no merit to the assertion that Haiti was obligated to mitigate its damages by "bonding back," and no evidence that it could have done so.

ARGUMENT

I

The Court Below Properly Accepted All But One of the Findings of Fact of the Magistrate, Corrected One Clearly Erroneous Finding, and Made Its Own Conclusions of Law.

As noted in the Statement of Facts, Magistrate Schreiber, acting as special master in accordance with 28 U.S.C. § 636 (b), submitted a recommendation to the court containing both finding of facts and conclusions of law. The Magistrate found (1) that interest charges were incurred by Banque Nationale by reason of the attachment, and he determined the amount of these charges; (2) that the interest charges were paid by Banque Nationale to First National City Bank, and he found the date and manner of payment; and (3) that the Republic of Haiti reimbursed Banque Nationale for the full amount of the interest expenses attributable to the attachment. Each of these findings is clearly a finding of fact; each is supported by the record; and each was accepted by the District Court, as it was bound to do, unless the finding was "clearly erroneous." Federal Rules of Civil Procedure, Rule 53 (e)(2). The Magistrate further stated (4) that there was no written agreement requiring reimbursement by Haiti; (5) that the obligation of Haiti to reply Banque Nationale for the latter's out-of-pocket expenses was not supported by consideration; and (6) that in any event this was merely a moral obligation. Statement (4) is "clearly erroneous" if a statement of fact, or an error of law, if a conclusion of law, and was properly rejected by Judge Weinfeld. The exchange of letters referred to in the Statement of Facts (page 8, supra) and set out at pages 99a-103a of the

Appendix plainly constituted a written agreement between Haiti and Banque Nationale concerning reimbursement. Statements (5) and (6), also rejected by Judge Weinfeld, were plainly conclusions of law, and as such were entitled to no weight with the court. See 9 C. Wright and A. Miller, *Federal Practice and Procedure*, § 2614 at note 34 (1971). See also, e.g., *D. M. W. Contracting Co.* v. *Stolz*, 158 F.2d 405, 407 (D.C. Cir. 1946), cert denied 330 U.S. 839 (1947).

The precise boundary line between findings of fact and conclusions of law is, of course, an elusive one, in this as in other areas where the scope of review of findings by a trier of fact is at issue. Two decisions, arising out of the same litigation in the Fifth Circuit, may illustrate the proper role of magistrate and District Court in a case coming under Federal Rule 53(b). In *W. R. B. Corporation* v. *Geer*, 313 F.2d 750 (5th Cir. 1963), a series of claims and counterclaims between a contractor and a subcontractor were referred to a master. The master submitted a Report favorable to the subcontractor, and the contractor excepted to the Report. In the first appeal, the Court of Appeals found that the trial court, in upholding the Report, had merely satisfied itself that the master's findings were supported by substantial evidence; that, said the Court of Appeals, is insufficient: the District Court is obligated not just to satisfy itself that the evidence was sufficient to support the finding, as in a jury case, but it must satisfy itself that none of the findings is clearly in error. Since it appeared that the trial judge had conducted his review of the master's report by inquiring only whether there was support in the record for the findings, the case was remanded to the trial court for review of the master's findings under the appropriate standard. On remand, the District Judge carefully went over each finding of the magistrate and satisfied himself that it was not clearly

erroneous. Thereafter these findings were not subject to challenge in the Court of Appeals. In addition to the factual conflicts, however, the master had made findings under the law of Texas concerning the consideration required to give effect to certain releases. The District Judge, interpreting the relevant Texas case law, disagreed with the master about the effect of the releases, and the Court of Appeals upheld the District Court:

> The master's findings relating to the releases were clearly erroneous as findings of fact, and were clearly wrong as conclusions of law. In either event, the District Judge properly set them aside. *W.R.B. Corporation* v. *Geer*, 332 F.2d 180, 181 (5th Cir. 1964), cert. denied, 379 U.S. 841 (1964).

The same standard applies here. However one may characterize the magistrate's conclusions about the existence of an agreement, about consideration, and about a "moral obligation," they are plainly not binding on—and indeed not entitled to deference by—the Article III court. Judge Weinfeld properly made the ultimate conclusion himself, and he did it correctly.[8]

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[8] For a searching discussion of the relation between Article III judges and magistrates, see Silberman, "Masters and Magistrates Part II: The American Analogue," 50 N.Y.U. L. Rev. 1297 (1975). The issue of scope of review of the magistrate's report is treated at 1329-32.

II

The Court Below Correctly Held That the Event Against Which the Insurance Company Issued the Bond Has Occurred: Defendant Incurred Expenses as a Result of the Attachment, the Attachment Was Dismissed on the Merits, and the Insurance Company Must Pay the Bond.

The critical element on which the insurance company's defense in this case depends was the statement through which plaintiffs were able to secure the second Order of Attachment, using the same bond that had been issued as a condition for the first, unsuccessful, Order of Attachment. But for that statement by plaintiffs' president, which was a misstatement, the second Order of Attachment would not have been issued; moreover, but for that statement, the original bond issued in connection with the first Order of Attachment would not have been permitted to support the second attachment directed to the account of Banque Nationale. The risk assumed by the insurance company, however, remained the same: The defendant might be held entitled to sovereign immunity, the claim might be held not actionable in New York, or the contract claim might be defeated on the merits. If any of these results occurred, the insurance company would have to pay out on the bond, for recoverable counsel fees and, in the case of liquid funds, for interest charges. The insurance company, of course, collected a premium for sale of the bond and, presumably, it took steps to secure itself vis-à-vis the out of state plaintiffs.

Under its theory before this court, however, the insurance company (i) would not be liable for interest charges to the Republic of Haiti, because the Republic did not own the attached funds; and (ii) would not be liable to Banque

Nationale, because Banque Nationale was not a defendant in the action or a named beneficiary on the bond. Though the very risk insured against took place—i.e., the attachment was vacated and judgment was entered in favor of defendants—the insurance company would escape liability on the bond. And the cause of this windfall would be the misstatement of its own customer. Stripped of the various subsidiary issues and diversions, what this appeal is about is whether an insurance company can avoid liability on its bond on such a "heads I win, tails you lose" approach to the risk it insured.

The court below properly rejected attempts to fractionate the transaction, and to make it appear as if the Republic of Haiti had bestowed a gift on Banque Nationale. Magistrate Schreiber, in his recommendation, drew an analogy (App. 263a) between this case and the case of a physician injured in an automobile accident who attempts to collect for the costs of medical treatment rendered gratis to him as a matter of professional courtesy. *Coyne* v. *Campbell*, 11 N.Y.2d 372, 183 N.E.2d 891, 230 N.Y.S.2d 1 (1962). Appellant, in its brief to this court, suggests that the Republic made a gift to Banque Nationale, presumably because the Finance Minister gave his assent to the debit to Haiti's account, rather than seeking to sue Banque Nationale to prevent the debit, or waiting to be sued to enforce the claim. But such explanations of what took place in this case are totally contrived, in the face of clear and uncontroverted evidence. Banque Nationale did not extend "professional courtesy" to Haiti, and Haiti did not make a gift to Banque Nationale. Banque Nationale paid out funds to First National City Bank because it was compelled to do so, for reasons having to do with a dispute to which Haiti was, but Banque Nationale was not a party. Quite properly, Banque Nationale charged its out-of-pocket ex-

penses back to its depositor, the Republic, and quite properly the Republic claimed reimbursement therefor on the bond.

The cases cited in the brief on behalf of Appellants (pp. 8-10) state the principle correctly. "Causality is the test. Did the attachment produce the expense?" (Brief for Appellant p. 10, citing *Elsman* v. *Glen Falls Indemnity Co.*, 146 Misc. 631, 638, 262 N.Y.S. 642, 649 (Sup. Ct. Bx. Cty. 1933). The answer in the present case is clearly yes. As Judge Weinfeld put it:

> Since the interest charges paid by Haiti to Banque were a direct consequence of the withdrawal from and the depletion of its account by reason of the attachment against Haiti, Haiti is entitled to recover the sums so paid as damages under the terms of the undertaking in its favor.
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> 416 F. Supp. at 1116, App. at 269a.

III

Defendant's Claims on This Motion Are Clearly Allowable and Have Been Established by Uncontradicted Evidence.

Though the procedure for collecting on a bond posted in a federal court action is provided for in the Federal Rules of Civil Procedure (Rule 65.1), it is state law that here provides the source of law to define the elements of allowable costs and damages. See 11 C. Wright and A. Miller, *Federal Practice and Procedure*, § 2973 (1973). In the instant case, the prevailing law is provided by Rule 6212 of the New York Civil Practice Law and Rules, and cases under that rule and its predecessors. Paragraph (b) of that Rule, followed in the Order of Attachment and in the bond in this action, states:

> On a motion for an order of attachment, the plaintiff shall give an undertaking, in a total amount fixed by the court, . . . a specified part thereof conditioned that the plaintiff shall pay to the defendant all legal costs and damages which may be sustained by reason of the attachment if the defendant recovers judgment or if it is finally decided that the plaintiff was not entitled to an attachment of the defendant's property. . . .

Costs and damages allowable under Rule 6212(b) include any expenses that materially and proximately resulted from the order of attachment. J. Weinstein, H. Korn, A. Miller, *New York Civil Practice*, Vol. 7-A, ¶6212.22 (1975 Rev.). Such costs and damages include damages for the deprivation of use of the property attached, *Subin* v. *U.S. Fidelity & Guaranty Company*, 12 A.D.2d 49, 208 N.Y.S.2d 278 (1st Dep't 1960);[9] and legal fees incurred in attempting to vacate the attachment, *Thropp* v. *Erb*, 255 N.Y. 75, 174 N.E. 67 (1930).[10] Both kinds of damages were incurred and proved in this case.

The Appellate Division of the New York Supreme Court has held that there is a presumption of damage, measured by the legal rate of interest, where there has been a deprivation of possession of property, even without proof of actual loss. *Subin* v. *U.S. Fidelity & Guaranty Company*, *supra*. In the instant case, there was no need to rely on such a presumption: a precise and detailed record of interest charges actually incurred by reason of the attachment of funds was submitted to the court (App. 73a-88a), and was

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[9] See also, *Plessner* v. *Continental Casualty Co.*, 25 Misc. 2d 518, 82 N.Y.S.2d 540 (S.Ct. N.Y. Cty. 1948).

[10] See also, *T.W. Warner Co.* v. *Andrews*, 73 F.2d 287 (2d Cir. 1934) cert. denied, 294 U.S. 717 (1935), and *A. C. Israel Commodity Co.* v. *Banco do Brasil, S.A.*, 50 Misc.2d 362, 270 N.Y.S. 2d 283 (S.Ct. N.Y. Cty. 1966).

found to have been paid by defendant (App. 102a (debit entry); App. 262a (Magistrate's finding); App. 269a (Judge Weinfeld's finding)). Likewise, a detailed statement of counsel fees was submitted (App. 89a-92a) and approved (App. 264a (Magistrate's finding); App. 269a (Judge Weinfeld's opinion)). Because of the small size of the bond,[11] it is not necessary for this court to rule on the controversy concerning the amount of the legal fee allowable,[12] unless it reverses on the principal issue raised by the appeal. There is no doubt—and inded there is no serious challenge on this appeal—that the amounts claimed on this motion constituted "legal costs and damages sustained by reason of the attachment," and are recoverable out of the bond given by the appellant.

IV

There Was No Obligation on Defendant to Act Otherwise Than It Did in Defending the Principal Suit.

In the course of resisting the motion on the bond, the insurance company raised a series of nuisance defenses. It asserted that defendant had failed to notify the insurance company of the claim; it claimed that Haiti should be deprived of its costs because Banque Nationale could have moved to discharge the attachment; and it urged the court to exercise its discretion to deny the claim on the bond because the Republic of Haiti raised the defense of sovereign

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[11] Plaintiffs originally filed notice of an appeal in the principal case and moved for a stay of the order vacating the attachment. The court announced that a stay would be granted pending an expedited appeal, conditioned upon filing of an additional bond to raise the total sum to $115,000. That amount would in all likelihood have covered all of defendant's allowable costs and damages. Thereafter however, plaintiffs withdrew their notice of appeal, leaving only the original $35,000 available for this motion.

[12] See Note 7 supra.

immunity in the principal case. The only one of these defenses that the insurance company maintains on this appeal concerns the supposed duty of the Republic of Haiti to mitigate damages. As Judge Weinfeld said in the decision below, this argument is "without substance." 416 F. Supp. at 1116, App. 270a.

As regards the factual predicate, the statement in Appellant's brief (at p. 14-15) that it was proven that the Republic of Haiti could have gotten a discharge of attachment bond is incorrect: The only witness called by the Appellant was asked whether in his 26 years with the State Insurance Department he had ever heard of a release of attachment bond issued to a foreign sovereign; he replied "No sir." (App. 245a.) The witness did not know whether such a bond might be issued to a foreign sovereign, (App. 245a-246a) and counsel for the insurance company failed to submit any evidence to the effect that such a bond could have been obtained. (App. 250a-252a.)

As regards the legal predicate, New York CPLR § 6222 permits a defendant whose property has been levied upon to move for an order discharging the attachment, against "an undertaking, in an amount equal to the value of the property . . . sought to be discharged." But the law of New York is clear that § 6222 is designed as a protection for the defendant, not for the plaintiff or plaintiff's bonding company, and is no way obligatory on the defendant.

In *Lawlor* v. *Magnolia Metal Co.*, 2 App. Div. 552, 38 N.Y. Supp. 36 (1st Dep't 1896),[13] the Appellate Division of the New York Supreme Court puts the point succinctly and clearly:

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[13] Appeal dismissed, 149 N.Y. 591, 44 N.E. 1125 (1896).

> This provision of the Code[14] which permits an undertaking to be given in discharge of an attachment, is an act of grace, and the provision for delivering up the property upon the giving of such an undertaking is a favor which the defendant is at liberty to accept or refuse.
>
> (2 App. Div. at 554, 38 N.Y. Supp. at 37)

Though the case is an old one, Weinstein, Korn, and Miller quote the above statement as authoritative (*New York Civil Practice*, Vol. 7A ¶6222.03), (1975 rev.) and a check in Shepard's citations confirms that the case has been often cited and not modified or reversed. Substitution of an undertaking by defendant for the property attached may provide important relief from the burden of attachment—for instance in the case of attachment of ships[15] or aircraft or possibly of particular securities in a volatile market. It is never a requirement placed on the owner of attached properties.

In the present case there were two particular reasons why the device of bonding back would have been wholly inappropriate, even if—as seems unlikely—Haiti could have secured a bond without putting up collateral of equal value to the property attached. (1) Making an affirmative motion might have been inconsistent with the defense of sovereign immunity;[16] and (2) making a motion under § 6222 would

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[14] § 709 of the Code of Civil Procedure of 1876 (The Throop Code) as amended in 1877, predecessor of N.Y. Civil Practice Act § 952 and of CPLR § 6222.

[15] See, e.g., *Worldwide Carriers Ltd.* v. *Aris Steamship Co.*, 290 F. Supp. 860 (S.D.N.Y. 1963).

[16] See *The Ucayali*, 47 F. Supp. 203 (E.D. La. 1942), reversed on other grounds (and prior to development of the restrictive theory of sovereign immunity) in *Ex Parte Peru*, 318 U.S. 578 (1943). For the basic rule on waiver of sovereign immunity, see *National City Bank* v. *Republic of China*, 348 U.S. 356 (1955).

have been inconsistent with Haiti's contention that the property attached did not belong to it.[17] Thus resort to bonding back by the defendant in this case could not under any interpretation be considered reasonable conduct, even if—as was not shown—the device had been available at all.[18]

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[17] See *Green River Distilling Co.* v. *Massachusetts Bonding and Insurance Co.*, 234 N.Y. 109, 111, 136 N.E. 310, 311 (1927). See also H. Peterfreund and J. McLaughlin, *New York Practice*, at 967 (3rd ed. 1973).

[18] The mitigation of damages defense is so insubstantial in this case as not to occupy the court further. As a matter of continuing interest in the conduct of quasi in rem actions, however, it may be worth calling attention to the recent discussion of "bonding back" by the United States Supreme Court. In *North Georgia Finishing Inc.* v. *Di-Chem*, 419 U.S. 601, 603 (1975), which struck down the Georgia garnishment statute in a commercial (as contrasted with a consumer credit) situation, the majority of the Court, in an opinion by Justice White, spoke of bonding back as some, but not sufficient, protection for the debtor. The dissenting judges pointed to the availability of bonding back as one element, along with the requirement that plaintiff put up a bond at the outset, and the fact that the principal suit must be filed first, as making the process not inherently unfair. 419 U.S. at 619. None of the justices regarded availability of bonding back as imposing an obligation on defendant, and Justice Powell, in a separate opinion, wrote:

> . . . [t]he issuance of the garnishment may impose serious hardship on the debtor. In this context, due process precludes the additional burden of conditioning the debtor's ability to question the validity of its issuance or continuation on the filing of a bond. 419 U.S. at 613.

CONCLUSION

This is an appeal that should never have been brought. There are no real questions of law, either of substance or of procedure. The court below decided the motion correctly, and its judgment for the full amount of the bond should be affirmed, together with interest from June 11, 1974 plus the costs of this appeal.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECONE CIRCUIT

76-7425

AEROTRADE, INC. and AEROTRADE INTERNATIONAL, INC.,

Plaintiffs,

against

REPUBLIC OF HAITI,

Defendant-Appellee,

against

HARTFORD ACCIDENT INDEMNITY COMPANY,

Respondent-Appellant.

On Appeal From The United States District Court
For the Southern District of New York

Affidavit of Service By Mail

STATE OF NEW YORK)
) SS:
COUNTY OF NEW YORK)

Louis Mark, being duly sworn, deposes and says: That he is over twenty-one years of age: That on the 17th day of December 1976 he served three copies of the attached Brief For Defendant-Appellee on Hendler & Murray, Attorneys for Respondent-Appellant, by enclosing said copies in a fully post-paid wrapper addressed as follows and depositing same in The United States Post Office maintained at No. 350 Canal Street, New York City, New York.

Hendler & Murray, Esqs.
15 Park Row
New York, N.Y. 10038

Louis Mark
Louis Mark

Sworn to before me this

17th day of December 1976

Quinton C. Van Wynen

QUINTON C. VAN WYNEN
Notary Public, State of New York
No. 24-4087465
Qualified in Kings County
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